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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 793

LESLIE MILLER INC., APPELLANT

v.

STATE OF ARKANSAS

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Appellant submitted a bid to the United States for the construction of certain facilities, at a cost of $1,093,431, on property owned by the United States in Arkansas. Being the lowest responsible bidder, appellant was awarded the contract. It executed the contract and began work. Appellant was convicted and fined for doing these acts without authority from Arkansas' Contractors Licensing Board, and thereby violating Act 124 of 1939, as amended (Ark. Stats. 1947, §§ 71–701 to 71–721).[1] The Arkansas Supreme Court affirmed.

[1] Act 124 of 1939, and the 1945 amendments to it, are printed in appellant's jurisdictional statement, pp. 14–27. Subsequent amendments, enacted in 1951 and 1953, are set out in our Appendix, *infra*, pp. 14–17.

The United States filed a brief as *amicus curiae* in the court below, arguing that the application of the state statute in the instant case is an unconstitutional interference with the operations of the Federal Government, and, moreover, is in conflict with the federal statutes and regulations governing procurement by the United States. We maintain the same position in this Court. The decision below goes beyond the bounds set by this Court for state regulation of independent contractors with the United States and seriously hampers the United States itself. Accordingly, we submit that probable jurisdiction should be noted.[2]

ARGUMENT

1. (a). The constitutional immunity from state regulation of the properties, functions, and instrumentalities of the Federal Government has been firmly established. *Mayo* v. *United States,* 319 U. S. 441; *United States* v. *Summerlin,* 310 U. S. 414; *Arizona* v. *California,* 283 U. S. 423; *Hunt* v. *United States,* 278 U. S. 96; *Johnson* v. *Maryland,* 254 U. S. 51; *Ohio* v. *Thomas,* 173 U. S. 276; *United States v. Snyder,* 149 U. S. 210; see *Osborn* v. *United States Bank,* 9 Wheat. 738, 867. This immunity, like the corollary immunity from state taxation, is necessary "in order to maintain the essential freedom of govern-

[2] In the event that probable jurisdiction is noted, the United States intends to file a brief as *amicus curiae*, urging that the judgment below be reversed.

ment in performing its functions." *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149–50. Similarly, this Court has indicated that the dealings of the Federal Government with independent contractors are immune from state laws which "interfere in any substantial way with the performance of federal functions" (*James* v. *Dravo Contracting Co.*, 302 U. S. at 157, 161), or "handicap efforts to carry out the plans of the United States." (*Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 104). The states may not "deprive [independent contractors] of power to serve the government as they were intended to serve it" (*James* v. *Dravo Contracting Co.*, 302 U. S. at 154–155) nor "affect or embarrass in any substantial measure the power of the United States * * * to secure aid from independent contractors" (*Smith* v. *Davis*, 323 U. S. 111, 115).

The sole exception from this constitutional immunity which has thus far emerged from the Court's holdings permits state laws to impinge upon independent contractors where the sole impact upon the United States is economic and is merely reflected in increased costs. Thus, nondiscriminatory taxes upon federal contractors have been upheld even though the United States ultimately bears the costs of these taxes. *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495; *Curry* v. *United States*, 314 U. S. 14; *Alabama* v. *King & Boozer*, 314 U. S. 1; *James* v. *Dravo Contracting Co.*, 302 U. S. 134.

The same principle was involved when the Court sustained the application to federal contractors of a New York safety requirement for building construction (*Stewart & Co.* v. *Sadrakula,* 309 U. S. 94) and upheld Pennsylvania's minimum prices for milk (*Penn Dairies, Inc.* v. *Milk Control Comm'n,* 318 U. S. 261). In both these cases, the tax precedents were believed to govern because the sole impact on the United States was a possible increased economic burden. *Stewart & Co.* v. *Sadrakula,* 309 U. S. at 104; *Penn Dairies, Inc.* v. *Milk Control Comm'n.,* 318 U. S. at 269–70.[3]

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[3] In *Penn Dairies*, the Court pointed out that the state regulation of milk "imposes no prohibition on the national government or its officers. * * * As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk." 318 U. S. at 270.

The opinions in *Penn Dairies* and *Stewart* cite *Baltimore & Annapolis R. R. Co.* v. *Lichtenberg*, 176 Md. 383, 4 A. 2d 734, appeal dismissed, 308 U. S. 525, which involved state licensing and safety requirements applied to a trucking company under contract with the United States. Appeal was dismissed for want of a substantial federal question, citing cases on the general validity of motor vehicle regulation, without regard to the instant immunity problem. 308 U. S. 525. In *Stewart*, when the Court followed *Baltimore & Annapolis*, it considered that case as involving safety provisions analogous to those in *Stewart*, which imposed only an economic burden on the Government. 309 U. S. at 104. The Court has thus never ruled directly upon the problem of a licensing statute which, aside from an economic burden, limits the operations of the United States.

The Arkansas Supreme Court relied in the instant case upon these authorities and the analogy of the tax cases. But here, as the following analysis of the Arkansas statute shows, the effect upon the United States is not only to increase its costs but to prevent it from making a free choice of contractors to build facilities in Arkansas. The Constitution does not allow Arkansas to interfere in this way with the function of the Federal Government.

(b). The Arkansas Act requires all contractors to be licensed before they may bid, contract, or undertake any project in Arkansas whose cost is $20,000 or more (Sections 1, 13). Such acts by an unlicensed contractor are declared to be misdemeanors punishable by fine (Section 13) and the licensing board is empowered to secure injunctions restraining performance in violation of the Act (Section 17). All invitations for bids and specifications must include a copy of the Act to indicate that a license is required before a bid will be considered (Section 18). A contract entered into by an unlicensed contractor is declared unenforceable at law or in equity (Section 13). Plainly, an unlicensed contractor is not able to carry out work for the Federal Government in Arkansas or even to bid for it.

Consequently, if the decision below stands, the United States must choose for its construction work in Arkansas only state-licensed contractors.

This is, in itself, a serious restriction, for the Government may often wish to open the bidding to contractors not already licensed; indeed, it may be essential to do so where a proposed federal facility has had no previous counterpart in the state. If non-licensed contractors are to be solicited, the burdensome procedure is as follows: The Arkansas licensing board has two regular meetings a year, in February and August, aside from special meetings under its bylaws or resolutions (Section 4). Written applications for examinations for licenses must be filed thirty days prior to meetings of the board (Section 8). The United States must, therefore, issue its invitation for bids more than thirty days before the board's February and August meetings, or a special meeting. And it must keep the invitation open for the several-months interval between application and license before it may validly, under Arkansas law, receive bids from all responsible contractors.

The instant case reveals how seriously such compliance would interfere with construction for the Federal Government in Arkansas. The Government invited bids on this contract about April 6, 1954. On May 12, 1954, after bids were received from one Arkansas firm and 15 out-of-state firms, the Government contracted with appellant, the lowest responsible bidder. The one-month interval between invitation and award did not coincide with any of the regular meetings of the licensing board and was, in any event, too

short for any application for a license to be acted upon by the board. It was for that reason, we presume, that, as stipulated here, some responsible contractors did not bid because they were unlicensed.

We believe that under the Constitution the Federal Government is free to decide when it wishes to construct facilities, who shall be its contractor, and how fast a project shall proceed. Other states, besides Arkansas, have licensing provisions for contractors, and if they are to apply to contractors for the United States the Government's freedom to act will be severely curtailed.[4] For these reasons, we submit that the decision below unduly hinders the performance of federal functions and therefore that the Arkansas statute exceeds the constitutional bounds of state authority.

2. Aside from the constitutional immunity protecting the Federal Government's activities, the application of the Arkansas statute conflicts with specific federal legislation and regulations governing procurement by the United States. As this

[4] In New Mexico and Arizona, an even longer interval is required between invitation and award, if a contract is to be open to all responsible contractors. Applicants for a license are required to have maintained an office in the state for at least 90 days preceding the application; and this may be disregarded only when the applicant is a specialty contractor and there are less than ten contractors operating in the state who are licensed for his specialty. Ariz. Code 1939 (1952 Supp.), Sec. 67-2306; N. M. Stat. 1953, Sec. 67-16-5.

Court has recognized, Congress can preclude state regulation of instrumentalities and contractors utilized by the Federal Government. *Franklin National Bank* v. *New York*, 347 U. S. 373; *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95; *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21; see *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U. S. 261, 269, 271–78. We submit that Congress has done so here.

A comprehensive scheme of procurement policies is found in the Armed Services Procurement Act of 1947 (Act of February 19, 1948, 62 Stat. 21, 41 U. S. C. 151 *et seq.*), and the regulations under it (32 CFR c. I (A), V (G), VII (J) (1954)), which have the force of law. *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 484; *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 389–90; cf. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110.

The standards with which federal officials are directed to comply, and the judgments they are expected to exercise, are laid out in some detail. The Act contemplates that the great majority of contracts for supplies and services will be placed through competitive bidding but that, in certain situations, the public interest requires that purchases be made by negotiation. Sections 2 (c), 3, 41 U. S. C. 151 (c), 152; See H. Rep. No. 109, 80th Cong., 1st Sess., p. 3; S. Rep. No. 571, 80th Cong., 1st Sess., p. 2. The Act sets forth 16 situations in which contracts may be negotiated

without advertising, including instances where the public exigency will not allow delay, where it is impracticable to secure competition, where it is in the interest of the national defense that a particular plant be kept available, etc. Section 2 (c) (1)–(16); 41 U. S. C. 151 (c) (1)–(16). It is also declared to be the policy of Congress that a fair proportion of contracts be placed with small business concerns. Section 2 (b), 41 U. S. C. 151 (b).

Even when awards are made on the basis of competitive bidding, cost is not the dispositive factor. The guiding principle is that the award be made "to that responsible bidder whose bid * * * will be most advantageous to the Government, price and other factors considered" (Section 3, 41 U. S. C. 152). Armed Services Procurement Regulations 1.307, 2.406–1 (32 CFR 1.307, 2.406–1) define a "responsible bidder" as one with adequate financial and technical resources, and a satisfactory record of performance, integrity, judgment and skills. Expanding upon the factors to be considered, Regulation 2.406–3 (32 CFR 2.406–3) provides that, besides price, procurement officials in considering bids are to take into account, *inter alia,* the judgment, skill and integrity of the bidder; his reputation and experience; prior work of a similar nature done by him; and the advantages or disadvantages to the Government that might result from making multiple awards. When contracts are negotiated,

Regulation 3.101 (32 CFR 3.101) requires contracting officers to give due attention to a minimum of 19 factors there listed. See also Army Procurement Regulations 590.301, 590.357 (32 CFR 590.301, 590.357).[5]

The Act and regulations thus required the federal procurement officials involved in the instant contract to exercise their judgment and discretion by giving due consideration to certain enumerated factors. See S. Rep. No. 571, 80th Cong., 1st Sess., pp. 2–3. And there is no question but that the contract was awarded to appellant in accordance with the governing federal law and regulations. In the opinion of the responsible officials, the bidding contractors licensed by Arkansas were not as well qualified to carry out the federal program as appellant, an out-of-state contractor not licensed by Arkansas. Nevertheless, Arkansas has sought to nullify the award and restrict the United States to contractors licensed by it. It would compel the federal officials to abandon their considered judgment in choosing appellant or to

[5] Concomitantly, the regulations provide that certain persons will not be awarded contracts. Those made ineligible include firms and individuals found to have violated the Walsh-Healey Act (41 U. S. C. 37), the Davis-Bacon Act (40 U. S. C. 276a–2 (a)), the Buy-American Act (41 U. S. C. 10b); firms and individuals convicted in a court of competent jurisdiction of fraud or violation of the anti-trust laws; and firms and individuals found by clear and convincing evidence to have violated certain named contract provisions. See 32 CFR 1.600 to 1.609; 32 CFR 590.600–50 to 590.609.

abandon the construction of this federal project in Arkansas. In our view, the Armed Services Procurement Act of 1947, and the regulations pursuant thereto, preclude the state from posing such alternatives. The Arkansas statute cannot validly apply to contractors with the Federal Government.

In *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U. S. 261, the Court considered whether a state's minimum price regulation conflicted with the federal procurement statutes and regulations. It held that the statutes were "wholly consistent" with acceptance of local price regulation since Congress specifically excused competitive bidding when it was "impracticable to secure competition," into which category state price regulation was deemed to fall (318 U. S. at 272–273, 277), and because numerous other provisions negated an inflexible policy of taking the lowest bid (318 U. S. at 273–75; see *supra*, pp. 9–10). Furthermore, the Army's regulations were found to have explicitly left the applicability of state price legislation to be determined by the courts (318 U. S. at 276–78).

There is, however, no provision of statute or regulation which can be adduced to support the subordination of federal procurement to the instant Arkansas statute. Here, the result would not be an adjustment in price terms and increased cost, as in *Penn Dairies*, but a nullification of the Federal Goverment's choice of contractor. The

State, in effect, warns the Government that if the United States persists in determining for itself the means of implementing national policy, the State will prosecute the Government's agents, will enjoin them from performing their contracts, and will prevent the United States from enforcing its contractual rights. The national procurement policy established by Congress is wholly inconsistent with the continued existence of these burdens. The Arkansas statute must, therefore, give way.

3. Finally, the Arkansas statute does not represent a state regulatory policy to which federal officials should bow out of deference to local interests. This again distinguishes the case from *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, and *Penn Dairies, Inc.* v. *Milk Control Comm'n.,* 318 U. S. 261, in which the local regulation safeguarded the health and safety of New York and Pennsylvania citizens while merely increasing the cost of federal operations. See 309 U. S. at 104; 318 U. S. at 279–81.

It may be argued that the Arkansas licensing statute is designed to protect the public health and safety in that the licensing board is required to consider, among the qualifications of any applicant for a license, his experience, ability, character, manner of performance of previous contracts, financial condition and equipment (Section 9). But this provision is paralleled by the comparable requirements of the federal procurement

law. It cannot be seriously suggested that the United States is incompetent to pass upon the qualifications of its independent contractors nor that it fails to do so. See *supra*, pp. 8–10. Moreover, the standard form provisions of government contracts embody statutory requirements which are designed to safeguard the interests of all citizens, including those of Arkansas. See U. S. Standard Form Nos. 23–Rev., 25–A, 41 U. S. C. App. 54.13, 54.16. And cf., with respect to fraud and misconduct, Section 11 of the Arkansas Act; 32 CFR 1.604–1, 590.604. The Arkansas statute does not establish any higher qualifications or standards than the federal law. It is apparent, therefore, that striking down this state statute, as applied to Government contractors, would not seriously impair the police power of the State nor prevent its objectives from being realized. Striking down the statute is necessary, however, to permit the realization of the Federal Government's objectives and program.

CONCLUSION

For these reasons, it is respectfully submitted that probable jurisdiction should be noted.

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APRIL 1956.

APPENDIX

Act 153 of Arkansas Acts 1951 provides:

AN ACT to Amend Sections 1 and 6 of Act 124, Approved February 24, 1939; to Amend the Second Unnumbered Paragraph of Section 71-708, Arkansas Statutes, 1947, and to Amend Section 13 of Act 124 of 1939, as Amended by Section 3 of Act 217, Approved March 20, 1945.

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 1. Section 1 of Act 124 of the Acts of the General Assembly, approved February 24, 1939, is hereby amended to read as follows:

"SECTION 1. For the purposes of this act a 'contractor' is defined to be any person, firm, partnership, co-partnership, association, corporation, or other organization, or any combination thereof, who for a fixed price, commission, fee or wage attempts to or submits a bid or bids to construct, or contracts or undertakes to construct, or assumes charge, in a supervisory capacity or otherwise, of the construction, erection, alteration or repair, or has or have constructed, erected, altered, or repaired, under his, their or its direction, any building, highway, sewer, grading or any other improvement or structure, when the cost of the work to be done, or done, in the State of Arkansas by the contractor, including but not limited to labor and materials, is twenty thousand dollars ($20,000.00) or more.

"Architects and engineers, whose only financial interest in a project shall be the architectural or engineering fees for pre-

paring plans, specifications, surveys and such supervision as is customarily furnished by architects and engineers, are specifically excluded from this act.

"Wherever the term 'general contractor' shall appear in this act it shall mean 'contractor', as hereinbefore defined, and wherever the term 'general contracting' shall appear in this act it shall mean 'contracting.'"

SECTION 2. Section 6 of Act 124, approved February 24, 1939, is hereby amended to read as follows:

"SECTION 6. Each member of the Board shall receive fifteen dollars per day while the Board is in session, and reimbursement for necessary traveling expense, board and lodging. The Board shall have the power to employ an assistant secretary at not more than two hundred dollars per month; an attorney-investigator at not more than three hundred dollars per month; two senior clerks at not more than one hundred seventy-five dollars per month each; and, two junior clerks at not more than one hundred thirty-five dollars per month each. All expenses incurred by the Board for the administration of this act are hereby authorized to be paid by the Board; provided, however, no funds may be expended for the purpose of purchasing or constructing a building or any portion of a building."

SECTION 3. The second unnumbered paragraph of Section 71–708, Arkansas Statutes, 1947, is hereby amended to read as follows:

"All certificates of license to engage in the business of contracting in the State of Arkansas shall expire the last day of June following the issuance or renewal thereof, and shall become invalid on that day unless

renewed. A fee of $50.00, payable at the time of filing the application, shall be assessed against each applicant and thereafter an annual renewal license fee to be determined by the Board but not to exceed $50.00 shall be paid by each licensee to defray the costs and expenses of the administration of this Act."

SECTION 4. Section 13 of Act 124, approved February 24, 1939, as amended by Section 3 of Act 217, approved March 20, 1945, is hereby amended to read as follows:

"SECTION 13. Any contractor who for a fixed price, commission, fee or wage, attempts to or submits a bid or bids to construct, or contracts to construct, or undertakes to construct, or assumes charge, in a supervisory capacity or otherwise, of the construction, erection, alteration or repair, of any building, highway, sewer, grading, or any other improvement or structure, when the cost of the work to be done by the contractor, including but not limited to labor and materials, is $20,000.00 or more, without first having procured a license to engage in the business of contracting in this State, or who shall present or file the license certificate of another, or who shall give false or forged evidence of any kind to the Board, or any member thereof, in obtaining a certificate of license, or who shall impersonate another, or who shall use an expired or revoked certificate of license, shall be deemed guilty of a misdemeanor, and shall be liable to a fine of not less than $100.00 nor more than $200.00 for each offense, each day to constitute a separate offense. No action may be brought either at law or in equity to enforce any provision of any contract entered into in violation of this act. The doing of any act

or thing herein prohibited by any applicant or licensee shall in the discretion of the Board constitute sufficient grounds to refuse a license to an applicant or to revoke the license of a licensee."

SECTION 5. The State Licensing Board for General Contractors shall be known hereafter as the "Contractors Licensing Board," and wherever the name "State Licensing Board for General Contractors," or the word "Board," shall appear in Act 124, approved February 24, 1939, or acts amendatory thereof, such name and word shall mean "Contractors Licensing Board." The Board shall adopt a seal for its use which shall have on it the words "State of Arkansas Contractors Licensing Board."

SECTION 6. If for any reason any provision of this act shall be held to be invalid it shall not affect the validity of the remainder of this act.

Approved February 23, 1951.

Act 245 of Arkansas Acts 1953 provides:

AN ACT to Fix Maximum Salaries for Certain Employees of the Contractors Licensing Board and to Limit the Number of Such Employees to Be Employed by the Board in Such Positions.

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 1. The Contractors Licensing Board is hereby authorized to employ an Assistant Secretary at a salary of not more than $300.00 per month; one Senior Clerk at a salary of not more than $275.00 per month; and two Junior Clerks at a salary of not more than $200.00 per month each.

SECTION 2. All laws and parts of laws in conflict herewith are hereby repealed.

Approved March 6, 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1956